Office-Supreme Court, U. S.
FILED
MAY 10 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. [redacted] 57

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

LaVern R. Dilweg,
815 15th Street, N. W.,

T. Bruce Fuller,
Tower Building,

R. H. McNeill,
815 15th Street, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

INDEX

Subject Index

	Page
Petition:	
Opinion	1
Jurisdiction	1
Statement	2
Statutes Involved	4
Questions Presented	4
Reasons for Granting Writ	4
Conclusion	6
Brief	7
Conclusion	28

Citations

Cases:

Barnet v. *Hines*, 105 F. 2d 96	25
Bowman v. *U. S.*, 10 Ct. Cls. 408	5, 14
Campbell v. *Oliphant*, 206 S. W. 2nd 406	5, 14, 25
Conrad v. *U. S.*, 32 Ct. Cls. 139	5, 14
59 Corpus Juris, p. 984, Sec. 582	19
Estep v. *U. S., etc.*, 327 U. S. 114	26
Eastern Utilities Associates et al. v. *Sec. & Ex. Comm.*, 162 F. 2d 385	23
Lincoln Electric Co. v. *Sec. & Ex. Comm.*, 162 F. 2d 379	23
McCord v. *Page, et al.*, 127 F. 2d 68	5, 14
Miller, 51 A. 2d 745, 356 Pa. 56	5, 14
Nagle v. *Lim Foon*, 48 F. 2d 51	24
National Labor Relations Board v. *Minnesota M. Mfg. Co.*, 179 F. 2d 323	24
Ohio Power Co. v. *National Labor Relations Board*, 164 F. 2d 275	23
Patterson v. *U. S.*, 115 Ct. Cls. 348	27
Standard Oil Co. v. *U. S.*, 339 U. S. 158	5
Snider v. *Buck*, 75 Fed. Supp. 902	23, 20

Page

U. S. v. *Jones*, 336 U. S. 641 27
U. S. v. *Cormick*, 329 U. S. 245 24
U. S. v. *Grimley*, 137 U. S. 127 ..... 5, 14
U. S. ex rel. Trimler v. *Carusi*, 166 F. 2nd 457 23
U. S. v. *Carusi*, 166 F. 2d 457 ..... 23, 25
Wilson v. *U. S.*, 25 Ct. Cls. 339 ..... 5, 14
U. S. v. *Babcock*, 250 U. S. 328 26

Statutes:

Act of 1925, 43 Stat. 939, Sec. 3(b) 2
Pay During Captivity, Title 10 U.S.C. 846 3
Tucker Act, 28 U.S.C.A. Sec. 1348 4
Administrative Procedure Act, 5 U.S.C.A. Sec. 1001-1011 ..... 4, 5, 12
Pay Allowances 37 U.S C. Sec. 1-31 and 231-319 and Sec. 671-915 ..... 4, 12
Missing Persons Act, 50 U.S.C.A. Appendix 1001-1017 ..... 4, 13

Miscellaneous:

Report of House of Representatives, 78th Cong., 2nd Session, Report No. 1674 16
Report No. 4405, June 13, 1944, Hearing No. 241 16
Vol. 90, Part 3 of 78th Congress, 2nd Session, Cong. Record pages 6483-6484 19
Report of House Committee on Judiciary, H. Rep. 1980, 79th Cong. 2d Session 22
Legislative History Senate Document 248, 79th Congress, 2d Session, page 380 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 735

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI

The petitioner, Vicente Moreno, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on November 7, 1950.

Opinion Below

The opinion of the Court of Claims (R. 18-31) has not been reported.

Jurisdiction

The judgment of the Court of Claims, as amended, was entered on November 7, 1950 (R. 32). A motion for a new trial, reasonably filed, was denied on the 9th day of January 1951. This Court extended the time to May 10, 1951, in which

to file this petition. The jurisdiction of the Court is invoked under the provisions of Section 3(b) of the Act of 1925, 43 Stat. 939, as amended.

Statement

Petitioner is a naturalized citizen of the United States. He enlisted in the United States Army in the Philippine Scout Unit on March 3, 1924, and served continuously in that capacity (R. 18) until his retirement by the United States Army on February 28, 1950, for which he was awarded full credit for *active service* from the time of his enlistment in 1924, for a period of 25 years, 11 months and 28 days.

Petitioner was appointed Second Lieutenant on May 28, 1936, and was taken prisoner by the Japanese Army on April 9, 1942, when they captured the Philippine Islands. (R. 19)

Petitioner reported to the United States Army on January 28, 1945 when they reconquered the Philippines, and served with the United States Army until his retirement on February 28, 1950.

The United States Army made a determination of petitioner's status as to his loyalty during the war, and on *December 7, 1945* found,——

> "* * * that his activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United States and that he be retained in service, have been approved."

The United States Army paid petitioner his pay and allowances from January 28, 1945, the time he reported back to military control, until his retirement on February 28, 1950, but denied his pay and allowances from October 1, 1942 to January 1, 1945, when the Japanese Army occupied

the Philippines. The Army made seven conflicting determinations as to petitioner's status, with the same findings of fact (R. 4-5), and at all times holding that petitioner was loyal to the United States.

Petitioner filed an action in the United States Court of Claims on July 23, 1948 to recover his back pay and allowances. (R. 1-17)

The Court of Claims dismissed the petition on June 5, 1950 on the sole ground that under the concluding clause of sec. 846 of Title 10 U. S. C., enacted March 30, 1814, 3 Stat. 115, R. S. sec. 1288, petitioner was not entitled to recover. It is significant to note that when the Army made its determination in this matter, it relied for guidance upon sec. 1288 revised statutes 10 U. S. C. 846 and not upon any provisions of the so called Missing Persons Act.

The Court of Claims reversed its holding as to the above statute, after considering petitioner's motion to set aside its judgment, and held that it did not apply to this petitioner, but that, under the Missing Persons Act, the decision of the representative for the head of the Army denying petitioner's claim was not subject to judicial review (R. 31), as the determination "• • • includes *legal* as well as factual elements, and Congress must have meant, by section 1009 as a whole, *that the troublesome questions* arising under the Missing Persons Act were not to be the subject of litigation." (R. 31) The Court of Claims then dismissed the petition as a matter of law, (R. 26) but did not pass upon petitioner's right to receive his pay and allowances, while a member of the United States Army, his contractual rights provided by the Constitution, or his rights under the Administrative Procedure Act, which provided for judicial review for all determinations made by the heads, or their subordinates, of administrative agencies, including the Army.

Statutes Involved

The Tucker Act, as amended by 28 U.S.C.A. section 1348; the Administrative Procedure Act, 5 U.S.C.A. sections 1001-1011; Pay Allowances, 37 U.S.C.A. sections 1-31, and 231-319, and sections 671-915, and the Missing Persons Act, 50 App. U.S.C.A. 1001-1017, of which all pertinent parts will be quoted in our brief attached hereto and made a part hereof.

Questions Presented

1. Whether the decision of the War Department, through its subordinates, was final and conclusive and deprived the Courts of judicial review, as to both factual and legal determinations.

2. Whether the Department of the Army may decide, contrary to the admitted facts, and the clear import of the language of the statutes and the Constitution of the United States, that a soldier of the United States Army may be deprived of his contractual rights as to his pay and allowances, while a member of the United States Army, when found by the United States Army to be loyal at all times during his service.

Reasons for Granting Writ

The decision of the Court of Claims is in conflict with the decisions of this Court, the Statutes, the Constitution and the provisions of the Administrative Procedure Act, in holding that the administrative determination by the Army board in the Philippine Islands is conclusive, final and not subject to judicial review, as to *"legal as well as factual elements"*, even though the facts are contrary to the conclusion of law decided by the Army and the Court of Claims.

The Court of Claims' decision in denying petitioner's claim to his back pay and allowances is contrary to the decisions of this Court, the United States appellate courts and even the Court of Claims' decisions, which hold that when a person enlists in the Army or Navy of the United States he is entitled to his pay, and a denial by the Army or Navy may be reviewed by the Courts. (*U. S.* v. *Grimley,* 137 U. S. 127; *McCord* v. *Page, etc.* 124 F. 2d 68; *Campbell* v. *Oliphant,* 206 S. W. 2d 406, and *re Miller* 51 A. 2d 745, 356 Pa. 56; *Bowman* v. *U. S.,* 10 Ct. Cls. 408; *Wilson* v. *U. S.* 25 Ct. Cls. 339; *Conrad* v. *U. S.,* 32 Ct. Cls. 139; that the right to maintain an action in the Courts by a member of the United States Army or Navy has never been questioned. (Id.)

The Court of Claims' last decision in denying petitioner's claim is based upon petitioner's rights under the Missing Persons Act (and did not pass upon petitioner's contractual rights) and holds that it could not decide whether or not the decision of the Army was arbitrary or capricious in denying petitioner's claim. This is in conflict with the Missing Persons Act and the decision of this Court in the *Standard Oil Company* v. *U. S.,* 339 U. S. 158 in which this Court took judicial notice of the fact that the Japanese Army, for all practical purposes, was in *complete control* of the Philippine Islands by May 1942, and continued in control until sometime subsequent to October 1944. As petitioner was "in the hands of the enemy", as found by the Army and the Court of Claims, and was not officially determined absent from his post of duty without authority, the Army had no right to deny petitioner's claim.

Petitioner's rights, in a case like this, have not been decided by this Honorable Court, and it is evident that the Court of Claims is confused as to its jurisdiction under the Administrative Procedure Act, 5 U.S.C.A., sec. 1001-1011.

Conclusion

It is respectfully submitted for the reasons stated above, and as stated in our brief attached hereto that petitioner's writ be granted.

LaVern R. Dilweg,
801 Bowen Building,
815 15th Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 735

VICENTE MORENO,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF FOR PETITIONER

The (a) *Opinion Below,* (b) *Jurisdiction,* (c) *Statement,* (d) *Statutes Involved,* (e) *Questions Presented* and (f) *Reasons for Granting the Writ,* set forth in the petition are made a part hereof by reference, and will be dealt with as we believe necessary for the court's consideration.

Statement

Petitioner, a naturalized citizen of the United States enlisted in the United States Army on March 3, 1924, in the Philippine Scouts, a unit and part of the United States Army. He served *continuously* in that capacity until his retirement by the United States Army in February 1950.

He was appointed a Second Lieutenant in 1936 and was serving in that capacity when he was captured by the Japanese on April 9, 1942 (R. 18, 19).

The Japanese Army had complete control of the Philippines from May 1942 until subsequent to October 1944.[1]

When the United States Army reconquered the Philippines, petitioner reported to the United States Army on January 28, 1945 (R. 22) and served continuously until his retirement in 1950.

The United States Army, in its written opinion dated December 7, 1945, found that petitioner's

> "* * * activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United States, and that he be retained in service, * * *." (R. 21.)

Petitioner was paid by the Army his full pay and allowances from the time he was able to return to the United States Army on January 28, 1945 until his retirement, but the Army refused to pay petitioner for the period from October 1, 1942 to January 1, 1945.

The Army board in the Philippines made seven determinations as to petitioner's status in its conclusions of law, or ultimate findings in conflict with its findings of fact, which are not in dispute.

The findings, that petitioner was loyal to the United States during his captivity, made by the Army on December 7, 1945, quoted above, were never changed (R. 21-26).

General J. M. Wainwright on May 7, 1942, issued an order, as authorized by General MacArthur, for all the

---

[1] This Court took judicial notice of the above fact in the case of *Standard Oil Company* v. *U. S.*, 339 U. S. 158.

United States Army in the Philippines to surrender (R. 22, 23), which was followed by General Sharp's order of May 11, 1942 (R. 23-24) and Colonel Hilsman's order, *in conformity thereto,* in which he ordered,—

"MESSAGE TO ALL FILIPINO OFFICERS AND MEN

1. Direct written orders have been received by me from General Sharp, and authorized by General MacArthur for me to surrender the Forces of Negroes.

2. These orders have been obeyed by this Headquarters and as a member of this command you also must obey them.

3. Failure to surrender classifies you as:

a. Deserter by Philippine and U. S. Governments—
Penalty—Death

b. Outlaw by Imperial Japanese Army—
Penalty—Death

4. By terms of the agreement the Imperial Japanese Army has been furnished:

a. Your name and home address.
b. Your present location.
c. The arms and ammunition you have.

5. *By surrendering you will draw full pay until you are mustered out of the Service and you will be entitled to all bonus and insurance privileges from USAFFE.* You will also be recognized as an HONORABLE prisoner of War by the Philippine Government, USAFFE and by the Imperial Japanese Army and treated as such.

6. Half of the Officers and men have already reported to Fabrica and are well treated.

7. Report in PERSON with your arms and ammunition to Cadre Barracks in Fabrica BEFORE midnight Wednesday, May 27th.

8. By complying with these orders you will SAVE YOUR HONOR, YOUR LIFE and ASSURE the safety of your family and friends.

ROGER HILSMAN,
Colonel, Inf. U.S.A. Commanding"

General MacArthur issued an order dated December 8, 1944[2], as follows,—

The Army board in the Philippines finally held (contrary to General MacArthur's order, issued by Colonel Hilsman

---

[2] General MacArthur, by letter dated 30 August 1950, as Supreme Commander for the Allied Powers informed the Philippine Government as follows:

"Republic of the Philippines

DEPARTMENT OF FOREIGN AFFAIRS

File No. 130.16

Manila, September 15, 1950.

SIR:

With reference to your radiogram of August 5, 1950, requesting certain information from General Douglas MacArthur to be utilized in the test case of Vicente Moreno v. The United States in the United States Court of Claims, I enclose two photostatic copies of General Douglas MacArthur's letter, dated August 30, 1950, regarding the matter.

Very truly yours,

(Sgd.) FELINO NERI,
Acting Secretary.

Enclosure: Two photostatic copies of letter dated August 30, 1950.
The Honorable Joaquin M. Elizalde, Philippine Ambassador, Washington, D. C.
Certified True Copy. (Signature.) Chief of Records. 9/28/50.

• • • • • • •

GENERAL HEADQUARTERS

SUPREME COMMANDER FOR THE ALLIED POWERS

Office of the Supreme Commander

30 August 1950.

DEAR DR. BERNARDO:

I have reviewed the material enclosed with the communication from Honorable Felino Neri, and done my best to recall the exact circum-

(R. 24-25), and General MacArthur's order of December 8, 1944 (R. 25-26), that petitioner was not entitled to his pay from October 1, 1942 to January 1, 1945, because he was permitted to be employed in the Philippines controlled by the Japanese, during which time he was assisting the guer-

---

stances which prompted the issue of the letter of 8 December 1944 from Headquarters United States Forces in the Far East to Chief of Staff, Philippine Army. The lack of records here and the time lag involved make it impossible for me to give conclusive evidence in this matter. It is my recollection, however, that the order was intended to eradicate any impression of a differential treatment between members of the Philippine Army and those of the Philippine Scouts. Unquestionably they should be treated on the same basis as regards this general subject.

Please assure Mr. Neri of my continuing interest in the fortunes of the Philippine veterans and of my willingness for him to put this letter to any appropriate use.

Sincerely,

(S.) DOUGLAS MACARTHUR.

Dr. Marcelino V. Bernardo,
Philippine Mission in Japan,
Rooms 501 and 502
Hattori Building,
Tokyo, Japan.

"HEADQUARTERS

UNITED STATES ARMY FORCES IN THE FAR EAST

321 — (8 Dec 44) FEPA APO 501

8 December 44

SUBJECT: Status of Members of the Philippine Army

To: Chief of Staff, Philippine Army

1. All officers and enlisted men of the Philippine Army including the Philippine Constabulary, who have been called into the service of the United States Army Forces in the Far East, remain on that status until relieved therefrom by orders issued by the Commanding General, USAFFE. Action by these individuals in surrendering to the enemy forces in conformity with orders issued by their commanders, or in refusing to surrender, has no effect on such status.

2. Any "parole" or "oath" signed by such personnel as a condition of release by the enemy from prisoner of war status will be considered as having been signed under duress and as of no validity. Such personnel remains subject to the orders of the Commanding

rillas, because such employment in the aid of the United States was not "upon authorization of a recognized guerrilla commander".

Statutes Involved

1. The Tucker Act, as amended, Section 1346, Title 28 U. S. C. A.,

> "(a) The District Court shall have original jurisdiction concurrent with the Court of Claims * * *."

2. Pay and Allowances, as amended, Title 37 U. S. C. A., Sections 1-31 and 231-319; section 671-915.

3. The Administrative Procedure Act of June 11, 1946, 60 Stat. 253, 5 U. S. C. A., 1001-1011,

> "Sec.1009. Judicial review of agency action.
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> Rights of review
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved

---

General, USAFFE, and will be assigned to appropriate duty in the Philippine Army units.

By command of General MacArthur:

(S.) G. E. TOMBERLIN,
1"Lieutenant, AGO,
Asst. Adjutant General.

Copies:
GHQ
CG, Sixth Army
CG, 8th Army
CT, FEAF
CG, USASOS
CT, 14th AA Command
Staff

Copies from the true copy of: Captain Ramon Camagay.
RICARDO V. NAVARRO,
3" Lieutenant, Inf.,
6" RC, 1" RB (PA) Apo 72".

by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any applicable form of legal action * * * in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *"

4. The Missing Persons Act, Title 50 App. U. S. C. 1001-1017,

"1002. Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, *captured by an enemy, beleaguered or besieged,* shall for the period he is officially carried or determined to be in such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled to thereafter * * *."

"Provided further, That there shall be no entitlement to pay and allowances *for any period during when such person may be officially determined absent from his post of duty without authority* and he shall be indebted to the Government for any payments from amounts credited to his account for such period." (Id)

Section 1006 of the above Act provides that when a person is found to be,

"alive and in the hands of *an enemy*"

that he is entitled to the benefits under the Act, while, Section 1014, provides,

> "Section 1014. Application of Act to persons besieged by the enemy. The provisions of this Act *applicable* to persons in the hands of an enemy shall also apply to any person beleaguered or besieged by enemy persons. * * *."

ARGUMENT

Petitioner's Contractual Rights

Are the Courts denied the right to review the determination of an Army board in the Philippines, where the facts are not in dispute and the board clearly disregards the law, whereby a soldier is deprived of his pay and allowances while a member of the United States Army?

The answer to the above question is obviously,—*no*. This Court in *U. S.* v. *Grimley*, 137 U. S. 147, and all other courts where the question has been raised, have held that when a person joins the United States Army or Navy, he has a contract with the United States Government and neither he nor the United States can set aside or avoid the rights of either parties. (*McCord* v. *Page*, 124 F. 2d 68; *Campbell* v. *Oliphant*, 206 S. W. 2d 406; *re Miller*, 51 A. 2d 745, 356 Pa. 56; *Bowman* v. *U. S.*, 10 Ct. Cls. 408; *Wilson* v. *U. S.*, 25 Ct. Cls. 339; *Conrad* v. *U. S.*, 32 Ct. Cls. 139.)

As stated in the cases cited above, never have the Courts denied a member of the United States Army his pay, or denied the Court's right to judicial review in upholding a soldier's contractual right for his pay, when found by the

Army that the soldier was loyal to the United States during the period involved.

The Missing Persons Act

The above Act did not take away petitioner's right to his pay and allowances while a member of the Philippine Scouts, a part of the United States Army.

Petitioner's rights to his pay and allowances were established by law when he enlisted and from that time, and thereafter there was a binding contract between him and the United States, which entitled him to his pay for all times until he was discharged.

The Missing Persons Act did not take away petitioner's contractual rights, but only added to other persons' rights to pay under that Act, as defined therein. Even under the above Act, the head of the Army Department had no right to deprive petitioner of his pay under the facts found by its designated head.

The Court of Claims upheld the Government's contention that—

> "* * * the final determination of the Commanding General, hereinabove referred to, that the plaintiff was not in a casualty status during the period here in question was and is conclusive, and that the correctness of that determination cannot be reviewed in a court" (R. 30).

The Congressional Reports show conclusively that it was not the intent of Congress in amending the Missing Persons Act to give to the head of the Department the unlimited license to act irrespective of restraint, or to deprive the Court of the right to review the determination in conformity with the intent and provisions of the statute. The conclusive determination was limited to the findings of facts as set forth in the Report and was for the purpose of pre-

venting a conflict in the findings made by the administrator in the foreign field and the accounting officers, General Accounting Office here.

The Report of the House of Representatives, 78th Congress 2nd Session, Report No. 1674, amending Act of March 7, 1944 (Missing Persons Act) to accompany H. R. 4405, clearly shows that Congress intended to make the findings of the head of the department, or by such subordinate as he may designate, final and conclusive only to "determination of administrative and fiscal matters that arise in the broad field of casualty administration * * *. They are requisite to such matters as evaluation of reports and information, the status of individuals, essential dates, appropriable debits and credits to individual accounts in casualty cases, waiver of overpayments, and facts of dependency" (Report, page 7).

Under the Act of 1944, before amendment, the language used "throws practically all cases open to interpretation by the accounting officers as to whether within the scope of the authority granted." The amendment removed those defects (Report, page 7).[3]

The Report pointed out that the provision as to "determinations * * * of entitlement * * * to pay and allowances * * * shall be conclusive." (Id. p. 8, 50 U. S. C. A. App. Sec. 1009.) This was added because—

> "Many situations have arisen and more are anticipated in which some determinations, *conclusive upon the accounting officers* of the Government, must be made of credits and debits to the account of missing per-

---

[3] The Hearings (No. 241) on said Report No. 4405, held June 13, 1944, clearly show that Congress did not intend to deprive the courts of judicial review, but were to protect the soldier as far as possible so he "*would not have to go to the Court of Claims*" and to prevent the General Accounting Office from overruling the Department's findings of fact. See Pages 2321, 2322, 2324, 2326.

sons. There are questions of rank, grade, classification of civilian employees, entitlements to allowances of various kinds, debits on account of allotments or family allowances, and the periods of various credits and debits. All of this can best be determined and should be determined by the head of the department concerned. The department should have authority utilizing its knowledge of military and administrative conditions and circumstances to determine whether a *promotion* has been made, whether entitled to *rental* allowance, whether *monetary allowances* for quarters is payable, *the rate of pay of civilian* employees and many *other questions arising through loss or inadequacy of individual records.* This provision grants the authority to make all such determinations" (Report No. 1674, page 8).

It is clear from the above report that the determination vested as conclusive was confined to findings as to the above facts, and not to vest anyone with the conclusive authority to determine that claimants were not in casualty status and not entitled to their pay and allowances when they were "in the hands of the enemy" during the period the Philippines were occupied by the Japanese, which would be contrary to the clear provisions of sections 1002, 1006 and 1014 of the Missing Persons Act.

The amendment to the Act of 1944 also made it plain that the determination could not charge claimants with any amount they received while in the hands of the enemy, by such enemy (Page 9 of Report; Section 1009 of Title 50, Appendix). In claimants' cases they were deprived of their entire pay and allowances when they received less than living wages from the puppet agency.

Mr. F. L. Yates, attorney conferee, Comptroller General's Office made a statement before the Senate Committee on Naval Affairs on February 12, 1942, pages 41, 42—hearings, and although it refers to Sections 10, 11 and 12, we

believe it covers Section 9 and explains the powers granted to the departments, as follows:

"Section 10 would make final and conclusive the determination of the head of the department, or such other person whom he might designate, on any question of status of a person in the military service. Now, we take that to mean the status with respect to whether he is missing, missing-in-action, on duty at a beleaguered post, or held by a neutral power, and so forth.

"SENATOR GILLETTE. It is a question of fact?

"Mr. YATES. Yes, as to his status. Section 11, the first one to which you referred, makes the authority of the head of the department, or someone designated by him, final and conclusive as to the fact of dependency. Now that goes to the wife, the children, or other dependencies of a person in the military or naval service. That is the determination of the fact of that dependency under the provisions of this act. Now that part of it in the first two lines of section 11 of the present draft of the bill would authorize such determination as to any dependencies affected by any provisions of this pending act, but the section goes on and says, 'The determination of the fact of dependency under the provisions of this act and the determination of the fact of dependency under the provisions of any and all other laws providing for the payment of pay, allowances, or other emoluments to enlisted men of the services'. So it goes apparently further as to dependencies of enlisted men than we thought was intended when we read the first copy of the bill. Further, this apparently is necessary, as far as the purposes of this particular bill are concerned. However, Mr. Warren, the Comptroller General, did not see fit in his report to raise that particular question.

"Now, in the General Accounting Office, we can see no particular objection, in an emergency measure, such as this, to accord the head of the department authority to determine finally the question of *fact* as to dependency with respect to the cases or the persons or the situations covered by this bill."

The Missing Persons Act of 1942 was amended July 1, 1944. Section 9 of the Act was amended in order to permit a more efficient and expeditious administration of the Act (See Vol. 90, Part 3 of 78th Congress, 2nd Session, of Congressional Record, pages 6483, 6484.)

Persons denied the benefits of the Missing Persons Act should be limited to those "absent without authority" as provided by sub-paragraph 2 of Section 1002 Missing Persons Act, 50 U.S.C.A. This is the only exception set forth in section 1002, which contains the basic provisions of the Act. Any exception set by such a law, limiting the effects of the general rule, must be construed strictly in accordance with a well established rule of statutory construction that exceptions listed down in legislative enactments should be construed against the inclusion of something not expressly included in the exception. (59 Corpus Juris, p. 984, sec. 582)

Sub-paragraph 2, section 1002 which limits the general rule has been officially interpreted in War Department letter to the Commander-in-Chief, AFWESPAC, Subject: Discharge of disloyal Philippine Scouts and similar personnel, and determination of their status under the Missing Persons Act as amended, dated 3 August 1945. Section 1, paragraph 3 reads: "The Secretary of War's direct authority is granted to the Commander-in-Chief, Army Forces, Pacific, under the provisions of the Missing Persons Act, as amended, to make a determination of 'absent from post of duty without authority' for Filipino personnel covered by paragraphs 1 and 2 above, when there is reasonably conclusive evidence of intent to avoid or shirk combat or hazardous duty or abandonment of loyalty."

The offense absent from post of duty without authority can be established only if either of these two conditions can be proved by conclusive evidence: (1) Attempt to avoid or

shirk combat or hazardous duty; (2) abandonment of loyalty.

In petitioner's case, there has been no charge against him that, at any time during his service as an officer in the Philippine Islands, he was AWOL. On the contrary, a determination was made that at all times, he was loyal to the United States. It is petitioner's contention that this is the only exception, which could support the determination made by the Army.

THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C.A., Sec. 1001-1011)

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against *arbitrary official encroachment on private rights.*" (*U. S.* v. *Morton Salt Co.*, 94 L. Ed. 364, 365.)

We, therefore, proceed to an analysis of this statute as set forth in the opinion of Judge Holtzoff, 75 Supp. 902:

Section 2 (a) of the Act defines the extent of the statute. It in effect provides that the Act applies to each authority of the Government of the United States, except the Congress, the Courts, the territorial governments, and the District of Columbia. For certain purposes, it also excepts courts-martial and military commissions as well as military or naval authority exercised in the field in time of war, or in occupied territory. It also excludes functions performed under the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944. The Army Department, therefore, is not exempted from the provisions of the statute, except in respect

to military authority exercised in the field in time of war or in occupied territory, and in respect to courts-martial. All other activities of the Army Department, including the one involved in this case, are within the scope of the Act.

Subsection (a) confers the right to secure a judicial review on any person adversely affected or aggrieved by any agency action within the meaning of any relevant statute. The effect of this provision is, on the one hand, to exclude from the right of judicial review all Governmental action affecting the public generally, but not impinging on the legal rights of any individual; and, on the other hand, to permit an appeal to the courts by any person whose individual legal rights are adversely affected. Obviously, the Petitioner is aggrieved by the defendant's denial of his claim and, therefore, is accorded the privilege of a resort to the courts.

Subsection (c) provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

The conclusion is inescapable that under the Administrative Procedure Act every final agency action is subject to judicial review at the behest of any person whose legal rights are adversely affected, unless the action is taken under a statute precluding judicial review, or unless the agency action is by law committed to agency discretion.

In this connection, it is desirable to consider sub-section (b) of Section 10, which provides that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence of inadequacy thereof, any 'applicable' form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent

jurisdiction. In other words, if there is provided an adequate specified statutory review proceeding in respect to any specified agency action, this form of proceeding should be pursued. In the absence or inadequacy of any such proceeding, recourse may be had to any applicable form of legal action. By the word "applicable" is meant "appropriate or suitable".

Consequently, the aggrieved party may invoke any suitable or appropriate form of proceeding or remedy.

Thus the Report of the Senate Committee on the Judiciary (S. Rept. No. 752, 79th Congress) submitted by Senator McCarran, states that the legislation "sets forth a simplified statement of judicial review designated to afford a remedy for every legal wrong." This Report in discussing Section 10 (a) makes the following observation:

"Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

"This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

The Report contains the following comment in respect to Section 10 (c):

"Agency action made reviewable specially by statute or final agency action for which there is no other adequate judicial remedy is subject to judicial review."

A similar statement is found in the Report of the House Committee on the Judiciary (H. Rept. No. 1980, 79th Cong., 2d Sess.).

Section 10 (e) of the Administrative Procedure Act, which relates to the scope of judicial review, authorizes the reviewing court to decide all relevant questions of law

and to set aside agency action found not to be in accordance with law. *(Rear Admiral W. A. Buck* vs. *Madeleine Ursula Snyder,* U. S. District Court Opinion, 75 Fed. Supp. 902)

So far as the petitioner has been able to ascertain, every Circuit Court of Appeals that has had occasion to consider the question has held (sometime by way of dictum) that the Administrative Procedure Act gives an increased right of judicial review. See: *Eastern Utilities Associates et al* v. *Securities and Exchange Commission,* 162 F. (2) 385 (1st C. C. A.); *Ohio Power Co.,* v. *National Labor Relations Board,* 164 F. (2) 275 (6th C. C. A.); *Lincoln Electric Co.* v. *Commissioner,* 162 F. (2) 379 (6th C. C. A.); and *United States ex rel Trimler* v. *Carusi,* 166 F. (2) 457 (3rd C. C. A.).

The Court in the *Carusi* case, *supra,* page 460, held that although the Statute provided that "decision of the Attorney General shall be final," that it is not final in the sense that the Courts cannot do anything about it, in light of the additional authority given under the Administrative Procedure Act.

In the present case, the facts conclusively show that from the time the Japanese Army occupied the Philippines, until the time they were reoccupied by the United States Army, petitioner and all other soldiers in the Philippines were in the hands of the enemy. The Court of Claims in its first opinion stated,—

> "We assume, without deciding that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was 'in the hands of an enemy' as those words are used in Section 1006. (page 13)"

The department's evidentiary findings show beyond question that petitioner was in the hands of the enemy from the time of his capture until the United States reoccupied the Philippines. Furthermore, that he was a prisoner of war

during the above period as stated in General MacArthur's Order of 8 December 1944 (R. 25-26 of Opinion),

> "• • • parole is not a termination of imprisonment. It is subject to termination at any time." (*Nagle* v. *Lim Foon*, 48 F. 2d, 51)

Since the department's representative determination that petitioner was not in casualty status while the Japanese occupied the Philippines, is unsupported by substantial evidence, it is "of course, arbitrary and capricious and may always be set aside." (*National Labor Relations Board* v. *Minnesota Mining and Mfg. Co.*, 179 F. 2d 323, opinion by Judge Sanborn, 8th Cir.)

In the case of *U. S.* v. *Carmack*, 329 U. S. 245, although the Court stated that it was unnecessary to determine whether or not the action taken by the Federal officials by the Condemnation Act could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so "capricious and arbitrarily" that their action was without adequate determining principle or was unreasoned, as the record did not raise such issue, the Court defined "arbitrary and capricious," footnote 14, page 244 as follows:

> "Arbitrary" is defined by Funk & Wagnalls New Standard Dictionary of the English Language (1944). as '1. Without adequate determining principle; . .' and by Webster's New International Dictionary, 2d ed (1945), as '2. Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned; . . . .'
>
> "Capricious" is defined by Webster's New International Dictionary, 2d ed (1945) as '2. Apt to change suddenly; freakish; whimsical; humorsome.' Cf. *Fox Film Corp.* v. *Trumbull* (DC) 7 F. 2d 715, 727; *Puget Sound Power & L. Co.* v. *Public Utility Dist.* (CCA 9th

Wash) 123 F. 2d 286, 290 writ of certiorari denied in 315 U. S. 814, 86 L ed 1212, 62 S Ct. 798; *United States* v. *Eighty Acres of Land* (DC 111) 26 F. Supp. 315, 319. See also *United States* v. *Certain Parcels of Land* (DC Md) 30 F. Supp 372, 379; *United States* v. *Parcel of Land* (DC Del) 32 F Supp 718, 721."

As stated in the case of *U. S. v. Carusi*, 166 F. 2d 457, 461, "Statutes which preclude judicial review are unusual." An example is the Economy Act of 1933, Title 38, U. S. C. A., Sec. 705, which provides,

> "All decisions rendered by the Administrator of Veterans affairs * * * shall be final and conclusive *on all questions of law and fact and no other official or court of the U. S. shall have jurisdiction to review by mandamus or otherwise any such decision.*"

The above section was held to be valid since retirement pay is a gratuity which Congress may withdraw *(Barnet* v. *Hines,* 105 F. 2d 96).

It is significant to note that the Court, in the above case, reviewed all of the discussions found in the legislative history of the Act pertinent to the exceptions found in Sec. 10 of the Administrative Procedure Act. The Court calls attention to the fact that Congressman Walter pointed out to the House of Representatives that this clause (Statutes preclude judicial review) was simply put in to provide for the unusual situation, where judicial review of administrative action was *actually precluded.* (See Legislative history Senate Document 248, 79th Congress, 2nd Session page 380)

Back pay due petitioner under the Missing Persons Act was due him as a contractual obligation of the government and not as a gratuity. (*Campbell* v. *Oliphant,* 206 S. W., 406, 185 Tenn. 415; in re Miller estate 51 A 2d 745, 356 Pa. 56)

In the case of *U. S.* v. *Babcock,* 250 U. S. 328, (cited in *Dismuke* v. *U. S.,* 297 U. S. 170, 172) the Act provided,—

> "That any claim *provided* which shall be presented and acted on under authority of this Act shall be held as finally determined *and shall never thereafter be reopened or considered.*"

In *Estep* v. *U. S.,* etc. 327 U. S. 114, the Court held that although the Act provided that decisions of local draft boards *shall be final,* that if the determination was contrary to the provisions in the Act, it was subject to judicial review, as the determination would be in defiance of the law.

In the present case where the facts show that petitioner was in the hands of the enemy, and the Act provides that he is entitled to pay and allowances during that period, the determination made that he was not entitled to pay and allowances is in defiance of the Act and subject to judicial review, as held in the case above.

A Soldier's Right to His Pay

The pay and allowances are fixed by Statutes, 37 U. S. C. A., Sections 1-31 and 10 U. S. C. A. sections 671 etc. The pay of an officer cannot be withheld under Section 277 of Title 10 U. S. C. A., when he is acting under an order he is bound to obey, (in re Smith Ct. C. 209), or except for certain violations set forth in the above Acts, none of which petitioner is charged with.

The Court, in its opinion, we respectfully submit, has misconstrued the Missing Persons Act, and the other Statutes as set forth above, overruling petitioner's contention,——

> "* * * if the undisputed facts show that the person in question was in a certain status" (in the hands of the enemy) "the department could not conclusively determine that he was not." (R. 31 of Opinion)

and in holding that the second provision in Section 1009, as follows,——

> "* * * Determinations are authorized to be made by the head of the department concerned * * * of entitlement of any person, under the provision of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive * * *.

is conclusive and not subject to review by the Courts. (Id.)

We believe that the Court, after reading and considering this Brief, in which the intent of Congress is shown by its Committee's Report, the Administrative Procedure Act, and the case applicable thereto, that the Court will reverse the Court of Claims' decision and find in favor of petitioner.

It is inconceivable to believe that Congress, in passing the Missing Persons Act, intended to deny pay and allowances to a soldier in the service of the United States, after he was ordered to surrender to the brutal and cruel Japanese enemy in the Philippines; but if he were *interned in a neutral country,* be entitled to pay and allowances.

The Committee's Report, set forth above, shows conclusively that Congress did not intend to provide that petitioner could not be deprived of his pay and allowances under the facts found in this case.

The Court of Claims must have dismissed petitioner's claim on the basis of its decision in the case of *Patterson* v. *U. S.,* 115 Ct. Cls. 348, in which it decided that it did not have jurisdiction as to the taking of lands by the Department of Interior, and could not, under this Court's decision, *U. S.* v. *Jones,* 336 U. S. 641, review the decision of that department. However, the Court did recognize the jurisdiction given by the Administrative Procedure Act, and stated that under the Act it would seem to give the Courts "apparently the United States District Courts to which the

Act gives jurisdiction in such cases, plenary powers to shape judicial review to fit the case. We conclude, therefore, that jurisdiction is in those Courts and not in this Court to right wrongs which petitioner charges in the petition."

We believe that the lower court erred in our decision and that there must be some Court in which a soldier is entitled to judicial review of a decision by a subordinate of any department, when it is clearly contrary to the law.

In addition to petitioner's rights to his pay, this is a test case, which all the Philippine soldiers and citizens are depending upon the United States to pay them for their services, and it is very important that the United States fulfill its contractual rights with them.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court, in the exercise of its jurisdiction, should correct the injustice caused by the decision below, by vacating the judgment of the Court of Claims and remanding the case to that Court with directions to that Court to grant petitioner a judgment as a matter of law, since the facts are not in dispute.

Respectfully submitted,

LaVern R. Dilweg,
T. Bruce Fuller,
R. H. McNeill,
Attorneys for Petitioner.

Bowen Building,
Washington 5, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

Borak v. *United States*, 110 C. Cls. 236, certiorari denied, 335 U. S. 821	10
Corfman v. *McDevitt*, 111 Colo. 437	10
Dismuke v. *United States*, 297 U. S. 167	9
Kelly v. *State Personnel Board*, 31 Cal. App. 2d 443	10
Meadows v. *United States*, 281 U. S. 271	9
Silberschein v. *United States*, 266 U. S. 221	9
State ex rel. Dresskell v. *Miami*, 153 Fla. 90	10
United States v. *Williams*, 278 U. S. 255	9

Statutes:

Act of June 10, 1948, 62 Stat. 354, 5 U.S.C., Supp. III, 652 (b) (3)	10
Administrative Procedure Act (60 Stat. 237, as amended, 5 U. S. C. 1001):	
Sec. 2	7
Sec. 3	7
Sec. 10	8
Missing Persons Act (Act of March 7, 1942, 56 Stat. 143, as amended, 56 Stat. 1093, 58 Stat. 679, 50 U.S.C. App. 1001, *et seq.*):	
Sec. 2	13
Sec. 6	14
Sec. 9	8, 14
Sec. 15	8, 17
War Claims Commission Act (62 Stat. 1240, 50 U.S.C. App., Supp. III, 2001	11

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947), p. 12	8
Recto, *Three Years of Enemy Occupation: The Issue of Political Collaboration in the Philippines* (1946), pp. 10-14	11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 57

VICENTE MORENO, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 26-31) is reported at 118 C. Cls. 30.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1950 (R. 32). Petitioner's motion for a new trial was overruled on Janu-

ary 9, 1951 (R. 32). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to May 10, 1951 (R. 32). The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims properly refused to set aside the Army Department's determination as to petitioner's military status and his non-eligibility for additional pay and allowances under the Missing Persons Act, where the Act expressly provides that the administrative determination "shall be conclusive" and where, assuming reviewability, the court found the determination to be neither arbitrary nor capricious.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Missing Persons Act (Act of March 7, 1942, 56 Stat. 143, as amended, 50 U.S.C. App. 1001, *et seq.*) are set forth in the Appendix, *infra,* pp. 13-17.

STATEMENT

The Missing Persons Act provides that any person in active service who is officially determined to be absent in a status of (1) missing, (2) missing in action, (3) interned in a neutral country, (4) captured by an enemy, or (5) beleaguered or besieged, is for the period he is officially determined to be in such absent status entitled to receive or have

credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence. *Infra,* p. 13. This case arises out of petitioner's claim under the Act for Army pay and allowances. The facts involved, as found by the Court of Claims (R. 18-26), may be summarized as follows:

Petitioner, a native of the Philippine Islands, was ordered to active duty on February 8, 1942, as a Second Lieutenant in the Philippine Scouts, a branch of the Army of the United States (R. 18-19, 26). The Philippines were besieged by the Japanese at that time and petitioner was taken prisoner by the Japanese Army on April 9, 1942 (R. 19). He was imprisoned on the Islands until June 28, 1942, when he obtained a release on parole by signing an "oath" to his captors (R. 19-20). He was not thereafter "confined or imprisoned by the Japanese, but was permitted to go at liberty to live with his family and to engage in business or private employment" (R. 22).

Petitioner accordingly returned home to live with his family in the Philippines (R. 20). He remained there until he recuperated from diseases he had contracted during his imprisonment (R. 20). In September 1942, having become strong enough to work, petitioner moved elsewhere in the Philippines where he lived with friends and worked at harvesting rice (R. 20). On April 10, 1943, he went to still another place in the Philip-

pines where he took employment as chief watchman for the "NARIC (National Rice and Corn Corporation) ", a corporation set up by the Imperial Japanese Government in its occupation of the Philippines (R. 20). The corporation later promoted petitioner to the position of purchaser in charge of its buying station (R. 20). He held this position until October 31, 1944 (R. 20).

At the beginning of his employment by the NARIC, petitioner joined a local unarmed guerrilla band which was in an inactive status (R. 20). In April 1944, this inactive guerrilla group disbanded (R. 20). Petitioner joined another unarmed local guerrilla unit on October 31, 1944, and remained associated as an officer with this unit, which was engaged in intelligence work, until January 28, 1945 (R. 20). Neither of these guerrilla units was authorized or approved by the American Army authorities (R. 20). Nor had petitioner ever been requested or authorized by any "recognized guerrilla commander to accept employment with the Japanese controlled" NARIC (R. 20).

On January 28, 1945, after the American Army had recaptured the Philippines, petitioner returned to American military control (R. 20). Subsequently, in December 1945, Army Headquarters for the Western Pacific Forces approved a recommendation that petitioner's "activities during the Japanese occupation of the Philippines did not constitute an abandonment of loyalty to the United

States and that he be retained in service" (R. 21).

In order to determine petitioner's eligibility under the Missing Persons Act for pay and allowances for the period between his capture and return to military control, the Army Department made several determinations as to his status under the Act (R. 22). These determinations consistently held petitioner to be entitled to pay and allowances for (1) the period from February 8, 1942 (when he was ordered to active duty in the Philippines which were then besieged by the Japanese Army) to April 9, 1942 (when he was captured), on the ground that he was then in a besieged status; (2) for the period of his imprisonment, that is, from April 9, 1942 to June 28, 1942, when he was released by the Japanese; and (3) for the period from June 28, 1942 to September 30, 1942, when he was living at home with his family and recuperating from the diseases contracted while imprisoned. However, with respect to the period from October 1, 1942 to January 27, 1945 [1] (when petitioner returned to American military control), the Army Department, after an initial conflicting determination, ruled petitioner ineligible for pay and allowances under the Missing Persons Act (R. 22, 27). This latter period included the period from October 1, 1942 to April 10, 1943, when he worked at harvesting rice (R. 20) and the period

[1] Although the findings of fact refer to January *1*, 1945, the correct date, as shown by the petition filed in the Court of Claims, is January *27*, 1945 (R. 5).

from April 10, 1943 to October 31, 1944, when he was employed by the NARIC (R. 20). *Supra*, pp. 3-4. On April 28, 1948, Army Headquarters in the Philippines, which had been delegated "authority for final action in cases of this nature", affirmed the correctness of the determination that petitioner was not entitled to pay and allowances "for the period from October 1, 1942 to January 27, 1945" (R. 4-5).

On July 23, 1948, petitioner filed suit in the Court of Claims for that pay (R. 1).[2] He alleged that "the United States Army authorities have wrongfully and without cause and in violation of [the Missing Persons Act] denied plaintiff's claim for his back pay" in the sum of $10,000 (R. 4, 5). The United States answered by denying each and every allegation of the petition (R. 17). After a hearing, the Court of Claims, upon the basis of its special findings of fact summarized above, concluded that petitioner is not entitled to recover (R. 26). The court recognized that the Missing Persons Act makes the Departmental determinations as to status of an individual under that Act and his entitlement to pay and allowances conclusive (R. 30). Pointing out, however, that even if the Act must be read so as to allow "suit to be brought if the departmental denial of the claim was arbitrary

[2] The petition filed in the Court of Claims is actually limited to a request for pay for the period from April 1, 1943 to October 15, 1944 (R. 4). The Court of Claims, however, was of the view that the period involved was October 1, 1942 to January 1, 1945 (R. 27).

and capricious", the court ruled that there was "no ready answer" to the question of petitioner's status in this case and that "it cannot be said that the answer which the department gave was arbitrary and capricious" (R. 31).

ARGUMENT

The decision of the Court of Claims is clearly correct, does not present the question to which petitioner's argument is chiefly directed and, we submit, does not require review by this Court.

1. Petitioner's chief contention is that the Court of Claims "is confused as to its jurisdiction under the Administrative Procedure Act" (Pet. 5) and that it erred in declining to assume jurisdiction to review his claim for benefits under the Missing Persons Act. The short answer to this contention is (1) that the Administrative Procedure Act is not applicable, and (2) that the court, despite its lack of power to review under that Act, actually did review petitioner's claim.

a. The Administrative Procedure Act expressly excludes from its coverage the type of claim here involved. Apart from any other reason as to the Act's inapplicability, it is significant that Section 2 (60 Stat. 237, as amended, 5 U.S.C. 1001) specifically excludes "from the operation" of the Act [3]

[3] The only exception to this exclusion from the operation of the Administrative Procedure Act relates to the public information requirements, which are in no way pertinent here. See Secs. 2 and 3, 60 Stat. 237, 238, 5 U.S.C. 1001, 1002.

all "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947." In enacting the Missing Persons Act, upon which petitioner's "claim is based" (R. 27), Congress provided that the Act "shall remain in effect until the termination of the present war with Germany, Italy, and Japan, and for twelve months thereafter, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate." (Sec. 15, 56 Stat. 147, 1093, 50 U.S.C. App. 1015).[4] This termination provision means, of course, that the operative provisions of the Administrative Procedure Act, including the judicial review provisions of Section 10 relied on by petitioner (Pet. 20-25), are not applicable to functions exercised by the Army Department under the Missing Persons Act. See *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 12.

b. The Government does not concede that the Missing Persons Act contemplates any court review of administrative determinations under the statute which, by the provisions of Section 9, are made "conclusive" (R. 30). The issue is presently being litigated and may be presented for the Court's consideration, if necessary and desirable, in an ap-

[4] Excluded from this termination provision of the Missing Persons Act are certain sections of that Act dealing with income tax benefits for servicemen, the Civil Service Retirement Act and other subjects not here material.

propriate case. Here, however, the issue is not properly involved since, contrary to petitioner's assertion, the court below did review the Army determination after trial of the case on the merits. It was only then that the court, assessing its factual findings against the Army determination, concluded that the problem confronting the Army was a difficult one, that there was "no ready answer to it", and that "it cannot be said that the answer which the department gave was arbitrary and capricious" (R. 31). Obviously, if the court below had not exercised a right of review, it would have been in no position to conclude that the Army determination was neither arbitrary or capricious and that it should not therefore be set aside. Thus, the ruling of the court below, far from manifesting a denial of jurisdiction to review, accords fully with the standard of review traditionally applied by the courts in cases in which review is appropriate. *Silberschein* v. *United States,* 266 U.S. 221, 225; *United States* v. *Williams,* 278 U.S. 255, 257-258; *Meadows* v. *United States,* 281 U.S. 271, 274; *Dismuke* v. *United States,* 297 U.S. 167, 172.

c. Furthermore, the facts found by the court below not only confirm the reasonableness of the Army determination, but show that any other determination would have been improper.[5] The only

[5] Although it is the reasonableness, and not the correctness, of the administrative determination which is in issue in those cases where judicial review is appropriate, the facts found by the court below establish, we submit, not only the reasonableness of the Army determination but its correctness as well.

period for which additional Army pay and allowances are sought is from October 1942 to January 1945.[6] But, during almost that entire period, petitioner was gainfully employed in a civilian occupation in the Philippines. In September, 1942, he started to work at harvesting rice (R. 20). In April, 1943, he took a job with the NARIC, a corporation created by the Japanese puppet government in the Philippines (R. 20). Indeed, the record shows that petitioner's employment with the NARIC led to his promotion to the position of purchaser in charge of one of the corporation's buying stations (R. 20). Since petitioner was actively employed and earning a livelihood during that period, there is little equity in a contention that the Government is obligated to pay him full military pay and allowances for that same period.[7]

One additional consideration emphasizes the correctness of the Army determination. Petitioner, as already stated, was employed by a Japanese puppet corporation from April 1943 through October 1,

---

[6] Petitioner received Army pay and allowances from February 8, 1942 through September, 1942, by which time he had recovered from the diseases contracted while imprisoned by the Japanese. *Supra*, p. 5.

[7] Compare the cases holding that even where a Government employee is wrongfully discharged, he is not entitled to full Government pay and allowances for the period of his wrongful removal from service if he was gainfully employed in private industry during that period. *Borak* v. *United States*, 110 C. Cls. 236, 247, certiorari denied, 335 U.S. 821; see Act of June 10, 1948, 62 Stat. 354, 5 U.S.C., Supp. III, 652 (b) (3). See also *Kelly* v. *State Personnel Board*, 31 Cal. App. 2d 443; *Corfman* v. *McDevitt*, 111 Colo. 437; *State ex rel. Dresskell* v. *Miami*, 153 Fla. 90.

1944 (R. 20). While there can be no doubt that Japanese occupation of the Philippine Islands involved detailed control over Philippine life,[8] it would be hard to impute to Congress an intent to allow full military pay and allowances to those who, like petitioner, took paying jobs with Japanese puppet agencies during the occupation. It is appropriate to note in this connection that the War Claims Commission Act (62 Stat. 1240, 50 U.S.C App., Supp. III, 2001), in providing for the payment of detention benefits to American civilians who were captured and interned by the Japanese on the Philippines, expressly excepts from the scope of the Act any civilian "who at any time voluntarily * * * in any manner served [the Imperial Japanese] government" (62 Stat. 1242, 50 U.S.C. App., Supp. III, 2004 (a). It seems obvious that a Congressional policy which excludes American civilians from receiving any special detention benefits if they served the Japanese Government, must necessarily preclude payments of benefits by the United States to soldiers in the Philippines who were not detained and took jobs with the Japanese Government or with corporations created by it.[9]

[8] Recto, *Three Years of Enemy Occupation: The Issue of Political Collaboration in the Philippines* (1946), pp. 10-14.

[9] Petitioner's reliance on the documents issued by General Wainwright on May 7, 1942 (Pet. 8) and by Colonel Hilsman on May 11, 1942 (Pet. 9), directing surrender of the American forces to the Japanese, warrants no different result. While the materiality of these documents is highly questionable, it is obvious that they can be of no aid to petitioner because he surrendered to the Japanese on April 9, 1942 (R. 19), *before* the documents were issued.

2. Petitioner also urges that the court below should have reviewed the Army determination involved here because it deprived him of his "soldier's contractual right for his pay" (Pet. 14). Essentially, however, a soldier's right to pay is statutory. In any event, no matter what the source of the right, it is clear that it must here be measured by the Missing Persons Act through which Congress has provided a comprehensive substantive and procedural system for determining when and under what circumstances a soldier's pay should continue while he is beyond military control.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
MORTON HOLLANDER,
Attorneys.

JUNE, 1951.

APPENDIX

The Missing Persons Act (Act of March 7, 1942, 56 Stat. 143, as amended, 56 Stat. 1093, 58 Stat. 679, 50 U. S. C. App. 1001, *et seq.*) provides in pertinent part:

> SEC. 2. Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, captured by an enemy, beleaguered or besieged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter, and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act: *Provided,* That such entitlement to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence shall not terminate earlier than the dates herein prescribed: *Provided further,* That there shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be indebted to the Government for any payments from amounts credited to his account for such period.

SEC. 6. When it is officially reported by the head of the department concerned that a person missing under the conditions specified in section 2 of this Act is alive and in the hands of an enemy or is interned in a neutral country, the payments authorized by section 3 of this Act are, subject to the provisions of section 2 of this Act, authorized to be made for a period not to extend beyond the date of the receipt by the head of the department concerned of evidence that the missing person is dead or has returned to the controllable jurisdiction of the department concerned. When a person missing or missing in action is continued in a missing status under section 5 of this Act, such person shall continue to be entitled to have pay and allowances credited as provided in section 2 of this Act and payments of allotments, as provided in section 3 of this Act, are authorized to be continued, increased, or initiated.

SEC. 9. The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act, and for the purposes of this Act determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act, and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may

designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided,* That no such account shall be charged or debited with any amount that any person in the lands

of an enemy may receive or be entitled to receive from, or have placed to his credit by, such enemy as pay, wages, allowances, or other compensation: *Provided further,* That where the account of any person has been charged or debited with allotments paid pursuant to this Act any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act to receive or have credited such pay and allowances shall not be subject to collection from the allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased per-

son. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act, except sections 13, 16, 17, and 18, in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part.

SEC. 15. This Act, except sections 13, 16, 17, and 18, shall be effective from September 8, 1939, and shall remain in effect until the termination of the present war with Germany, Italy, and Japan, and for twelve months thereafter, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate.

☆ U. S. GOVERNMENT PRINTING OFFICE 1951 953714 907

11

FILED

SEP 14 195

IN THE

Supreme Court of the United States

October Term, 1951

No. 57

VICENTE MORENO, *Petitioner*

v.

THE UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER TO ANSWERING BRIEF OF THE UNITED STATES

LAVERN R. DILWEG
815 15th Street, N. W.
Washington, D. C.
Counsel for Petitioner

T. BRUCE FULLER
ROBERT H. McNEILL
Washington, D. C.
Of Counsel

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

	PAGE
Reply Brief	1
Facts	2
Navy Department Policy	2
Missing Persons Act	4
In the Hands of the Enemy	4
Petitioner's Employment	5
The Administrative Procedure Act	6
Arbitrary or Capricious	7
Ultimate Findings Erroneous	8
Army's Conflicting Determinations	10
Treatment by Japanese Army	11
Statutory and Contractual Right to Pay	14
Conclusion	14

Authorities

Annotation, 94 L. Ed. 646	7
Baker v. McCarl, 24 F. 2d 897	14
Carrington v. U. S., 46 Ct. Cls. 279	15
Estep v. U. S., 327 U. S. 114	4
Ford v. U. S., 69 F. Supp. 332	15
Glavey v. U. S., 182 U. S. 595	15
Harry Walsh v. U. S., 43 Ct. Cls. 225	15
Kain Koon Wan v. E. E. Black, Ltd., 75 F. Supp. 553	7
McCarl v. Lond, 38 F. 2d 943	14
McCarl v. Pence, 18 F. 2d 809	14
McMath v. U. S., 248 U. S. 151	15
Miquel v. McCarl, 291 U. S. 442	15
National Lead Co. v. U. S., 252 U. S. 140	11
Standard-Vacuum Co. v. U. S., 339 U. S. 157	4
Snider v. Buck, 75 F. Supp. 902	7
Smith v. U. S., 24 Ct. Cls. 209	14
In Re Territo, 156 F. 2d 142	5, 6
Thomas Kenny v. U. S., 62 Ct. Cls. 328	14
U. S. v. Andrews, 240 U. S. 90	14, 15
U. S. v. Esnault-Pilterie, 299 U. S. 201	10

PAGE

U. S. v. Seminole Nations, 299 U. S. 417 10
U. S. v. Penn Foundry & Mfg. Co., 337 U. S. 198 .... 10, 12
U. S. v. Falk, 204 U. S. 142 11
U. S. v. Williams, 23 Wall. 411 14
U. S. v. Wickersham, 201 U. S. 390 14
U. S. v. James, 110 F. 2d. 65 15
White v. U. S. 72 Ct. Cls. 375 ..... 14, 15

Statutes

50 U. S. C. A. Appendix Sec. 1006, Missing Persons Act 4, 7, 8
50 U. S. C. A. Appendix Sec. 1009, Missing Persons Act 5, 8, 9
Geneva, International Convention 6
5 U. S. C. Sec. 1001, Administrative Procedure Act 6
Act of June 24, 1948, Sec. 4(c), c, 625 Title 1, 62 Stat. 608 7
10 U. S. C. A. Sec. 877 14

In The

Supreme Court of the United States

October Term, 1951

No. 57

Vicente Moreno, *Petitioner*

v.

The United States

On Petition for Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER TO ANSWERING BRIEF OF THE UNITED STATES

The material facts as set forth in the Court of Claims' Special Findings of Fact (R. 18-26), and the petition and briefs of the parties herein are not in dispute.

It is petitioner's contention that the Army's final determination is contrary to its and the Court's Special Findings of Fact, and the law, in denying petitioner his back pay and allowance while an officer in the U. S. Army, during the period he was "*in the hands of the enemy,*" the Japanese Army, from the time they conquered, occupied and controlled the Philippine Islands, until they were reconquered by the U. S. Army. Petitioner was found to have been loyal to the United States during that period. Petitioner was retired and awarded credit and is being *paid for continuous active*

service from the time of his enlistment in 1924, until his discharge as of February 28, 1950, but the Army has wrongfully and without authority withheld petitioner's pay during the period he was confined in the Philippine Islands during their occupation by the Japanese Army.

The Navy Department, contrary to the erroneous policy of the Army Department, has paid its Filipino civilian employees and Filipino members of the United States Navy for the period they were in the Philippines during the Japanese Army occupation, in recognition of their contractual and statutory rights to pay and their rights under the Missing Persons Act, in all cases except where a party was found to have been disloyal to the United States, or absent from his post of duty without authority.

The Army cannot justify withholding from petitioner and members of the United States Army their back pay in defiance of the law when Filipino civilian employees and members of the United States Navy were paid under the same or similar circumstances.[1]

---

[1] DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAG:II:3:RT:evs

Lieutenant Colonel Manuel Q. Salientes, GSC, AFP
Military Attache
Embassy of the Philippines
Washington, D. C.

My dear Colonel Salientes:

Reference is made to your letter of 13 December 1950, addressed to the Foreign Liaison Officer, Department of the Navy, which has been referred to this Office with request that reply be made direct to you.

Your letter requests information on the following points in connection with the application by the U. S. Navy of the provisions of the Missing Persons Act (Act of Congress, approved 7 March 1942, as amended, 50 U. S. C. App. 1001-1015) with respect to Filipino civilian and naval personnel in the service of the U. S. Navy during World War II:

(a) For what periods were Filipino civilian employees who were captured and interned by the enemy paid arrears in pay?

(b) For what periods were Filipino naval personnel in military service of the U. S. Navy who were captured and interned by the enemy paid their arrears in pay?

(c) In cases where pay was denied for certain periods, if any, what policy was adopted in denying entitlement to such pay? As a general rule, entitlement to full salary arrears for civilian employees was computed from 10 December 1941 to 28 February 1945, except when the records indicated that payment of regular wages was made by the activity to which the employee was attached on a date subsequent to 10 December 1941. In that case the payment under the Missing Persons Act started with the day following the date of last payment and continued through 28 February 1945, the standard separation date.

In addition to the regular pay accrued, payment was made at the regular rate for a maximum of ninety days' annual leave. Allowed claims from heirs of deceased personnel are paid to include the standard separation date, 28 February 1945, regardless of the actual date of death.

Filipino naval personnel were paid their arrears in pay for the entire missing period, beginning with the date following the date of their last payment, which could have occurred any time subsequent to 10 December 1941, through the date they were declared a survivor.

Pay to civilian and military personnel was denied in whole where reasonable proof of collaboration with the enemy was established. Payment was also denied to civilian employees who were in an unauthorized leave status at the date entitlement to pay under the Missing Persons Act commenced.

While the dates furnished above were the dates used generally, insofar as possible each case was settled on its own merits and specific dates applicable to a particular case were used when available. For the purposes of expediting settlements and arriving at the true facts in each case, the Secretary of the Navy, under authority of the Missing Persons Act, established the Mobile Personnel and Settlement Unit and authorized the Officer-in-Charge of this Unit to act for him in examining and settling claims of civilian personnel of the Navy and Marine Corps in liberated areas outside the continental limits of the United States.

I regret that the reply to your letter has been so long delayed.

Sincerely yours,

/s/ G. L. RUSSELL
Rear Admiral, U. S. Navy
Judge Advocate General of
the Navy

A TRUE COPY:

In the Hands of the Enemy

The undisputed facts show that petitioner and members of the U. S. Army, were taken prisoners by the Japanese Army and were confined in the Philippines under complete Japanese control until their recapture by the American Army. The Court of Claims stated in its first decision, "We assume, without deciding, that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was

> 'in the hands of the enemy' as these words are used in Section 1006" (of the Missing Persons Act).

Regardless of the above facts the Army denied petitioner's claim, in defiance of the clear language in Section 1006 of the Act.

As stated in *Standard-Vacuum Company* v. *U. S.*, 339 U. S. 157, 159, it is "judicially known that the Japanese were, for all practical purposes, in complete control of the Philippine Islands by May 1942 and continued in control until sometime subsequent to October 1944, when the United States Army returned."

Since petitioner was "in the hands of the enemy" and found to be loyal to the United States during the time of the Japanese occupation and control of the Philippines, the Army had no jurisdiction under Section 1006 of the Act to deny petitioner his pay and allowance, and its refusal to do so is in defiance of the law. (*Estep* v. *U. S.*, 327 U. S. 114, 121).

Respondent, in his brief, only refers to the status of persons "(1) missing, (2) missing in action, (3) interned in a neutral country, (4) captured by an enemy, or (5) beleaguered or besieged", who are entitled to pay under the Missing Persons Act, but omits the provision of Section 1006 of the Act, which provides "*that a*

*person * * * alive and in the hands of the enemy * * *" is entitled to his pay.* (R. 28).

In *Re Territo,* 156 F. 2nd 142, the Court held that where the defendant was captured by the U. S. Army in Italy, was brought to the United States, was paroled under oath and employed, he remains a prisoner of war until the peace treaty has been negotiated with Italy.

It is respectfully submitted that neither the head of any department nor the courts have the authority to deny a right expressly and clearly provided for by statute.

Petitioner's Employment

Not only was the Army decision upheld by the Court, in violation of Section 1006, but it was a direct violation of the provision of Section 1009 of the Act which states immediately following the words "and all such determinations shall be conclusive:"

> "*PROVIDED,* That no such account shall be charged or debited with any amount that any person in the lands of an enemy may receive or be entitled to receive from, or have placed to his credit by such enemy as pay, wages, allowances, or other compensation." (R. 15, 16).

Here the Army did the very thing which the above proviso prohibited. It held that petitioner was not entitled to his pay and allowance for the period he was employed by the Japanese controlled agency, although he aided the guerillas and did intelligence work during that period, and was found to have been loyal to the United States at all times. If the Army had deducted from Petitioner's pay whatever small wage he received, that alone would have been contrary to the above proviso, but here the Army went beyond that and deducted petitioner's entire pay and allowances for the period of his employment. He risked his life by his guerrilla and

intelligence work for the United States, and received as his reward a denial of the pay due him by the Army because he was forced to work or starve.

Under the International Convention of the 27th of July 1929, relative to the treatment of prisoners of war, Geneva, which Japan accepted, Article 27 provides that if a prisoner of war requests work, this shall be found for them, including work for the State, public administration or private individuals, as provided under Article 34.[2]

It is evident that the Army exceeded its jurisdiction in denying petitioner's pay, as the determination is clearly in defiance of Section 1009 of the Act and the law.

The Administrative Procedure Act

This Act covers the type of claim here involved, contrary to respondent's argument on pages 7 and 8 of its brief. Section 1001 of 5 U. S. C. exempts from the Act military or naval authority exercised in the field of war or in occupied territory, or functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947. Here petitioner's claim was denied by the Army on April 28, 1948. The functions which by law require the Army to pay petitioner have not expired, either under his contractual and statutory right or under the Missing Persons Act. The Army's determination here does not cover military or naval authority exercised in the field

---

[2] The above Convention also provides "that 'Prisoners of War' may be interned in a town or other places, and may be required not to go beyond certain fixed limits. They may also be interned in fenced camps; they shall not be confined or imprisoned except as a measure indispensable for safety or health and only so long as circumstances exist which necessitates such a measure." (Article 9). See also *In re Territo*, 156 F. 2nd 142.

of war. (See annotation 94 L. Ed. 646, citing *Snyder* v. *Buck*, 75 F. Supp. 902, and *Kain Koon Wan* v. *E. E. Black, Ltd.*, 75 F. Supp. 553).

Respondent argues, page 8 of its brief, "that this termination provision means, of course, that the operative provisions of the Administrative Procedure Act, including the Judicial review provisions of Section 10 * * * are not applicable to functions exercised by the Army Department under the Missing Persons Act." The argument is based, as far as petitioner can determine on the Provisions of Section 3 of the Joint Resolution of July 25, 1945, c. 327, 61 Stat. 451, which provides that the date of *July 25, 1947*, shall be deemed to be the termination date of any state of war theretofore declared by Congress and of national emergencies proclaimed by the President. However, Section 4(c) of the Act of *June 24, 1948*, C, 625 Title 1, 62 Stat. 608, deleted from the operation Sec. 3 of said Joint Resolution, the Act of March 7, 1942, 56, Stat. 143-148, Ch. 166,—the Missing Persons Act.

An Amendment to the Missing Persons Act (H. R. 1199) was passed by the House by unanimous consent on or about June 4, 1951, which is evident that the Act has not expired.

Arbitrary or Capricious

Respondent states on page 9 of its brief that if the Court below had not exercised a right of review, it would have been in no position to conclude that the Army's determination was neither arbitrary nor capricious and that it should not therefore be set aside. We do not believe that the Court either exercised a right of review or concluded that the Army's determination was neither arbitrary nor capricious. The Court held,—

> 1. "* * * Congress must of meant, by Section 1009 as a whole, that the troublesome questions arising under the Missing Persons Act *were not to be the subject of litigation.*" *and*

as whether petitioner was,—

> 2. "* * * in the status of a person 'captured by an enemy, beleaguered or besieged' as the statute provides, is difficult indeed. There is no ready answer to it, and it cannot be said that the answer which the department gave was arbitrary and capricious." (R. 31).

Under the above ruling the Court held (1) that petitioner's claim was not subject to litigation, which deprives the Court of judicial review, and (2) that there was no ready answer, and therefore the Court did not decide whether the Army's determination was arbitrary and capricious.

It is noted the Court's decision under (2) quoted above was confined to the status of a person (a) captured by an enemy, and (b) beleaguered and besieged, and not to whether petitioner was "in the hands of an enemy", as he was, which entitles him to his pay and allowances under Section 1006.

The Court also failed in considering Section 1009 in holding that the Army's determination was conclusive to pass upon the material *proviso* in *Section 1009*, supra, which prohibits the deduction and withholding of petitioner's pay by virtue of his employment. The Court, in printing part of Section 1009, deleted this material *proviso*. (R. 29).

Ultimate Findings and Conclusion of Law Are in Conflict With Findings of Fact, the Statutory Right to Pay and Missing Persons Act

The Court failed and refused to make ultimate findings in accordance with its findings of fact as follows:

1. It found that petitioner was captured and taken prisoner by the Japanese Army on April 9, 1942, (R. 19) and confined to the Philippines until they were recaptured by the United States. (R. 20). However, the Court refused to make an ultimate finding based upon the above, the undisputed facts, that petitioner was "in the hands of the enemy" during the above period, although the Court, in its first opinion stated,—"We think without deciding, that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was *'in the hands of the enemy'*, as those words are used in Section 1006."

2. The Court in its ultimate finding in construing Section 1009, failed and refused to find that the proviso in said section prohibited the Army from deducting from petitioner's account any pay, wages, allowances, or other compensation he received from the enemy.

Respondent claims that the Army's determination is conclusive under Section 1009, which the Court sustained (R. 30, 31), relying upon the following part of the section:

> "Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person under provisions of this Act to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *PROVIDED, that no such account shall be charged or debited with any amount that any person in the lands of an enemy may receive or be entitled to receive from, or have placed to his credit by such enemy as pay, wages, allowances, or other compensation* * * *" (50 U. S. C. A. App. Sec. 1009).

Although the part underscored by us was not passed upon by the court it clearly prohibits the Army from making a determination contrary to the express terms therein, but the Army did so, and held that petitioner

was not entitled to his pay during the period of employment under a Japanese controlled agency, although "he was in position to aid the guerrillas, and that he did aid them, in his capacity as employee of the puppet agency," (R. 5), and was loyal to the United States during that period. (R. 21).

Since the Court's ultimate findings, conclusion of law, and judgment are in conflict with the findings of fact, and in defiance of the Missing Persons Act and the law, the judgment below should be reversed. (*U. S.* v. *Esmault-Pilterie*, 299 U. S. 201, 205-206; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 422[3]; *U. S.* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198.[4]

Conflicting Determinations of Army

The Army made seven determinations as to petitioner's status[5] from the time he was taken prisoner until

---

[3] A Court of Claims judgment "may not be upheld as to any item that is not supported by definite findings of facts extending to all essential issues and which, unaided by statements in the Court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover." 299 U. S. at 422.

[4] As the affirmative evidentiary findings made by the Court add up to an inescapable ultimate finding that petitioner is entitled to his pay and allowances, the judgment of the Court of Claims should be reversed and the cause remanded with direction to enter judgment in favor of petitioner. 337 U. S. at 212-214.

[5] (a) *May 1942*—by Col. Hilsman,—that the prisoners would draw full pay until mustered out of the service. (R. 25).
(b) *December 8, 1944*—by General MacArthur,—that parole and oath was signed under duress and not valid. (R. 25, 26).
(c) *May 3, 1945*—Headquarters of United States Army,—that plaintiff was beleaguered, prisoner of war and missing in action from *February 8, 1942* to *January 27, 1945*. (Ex. C to Stipulation of Facts).
(d) *December 7, 1945*—Headquarters of United States Army, —that plaintiff was loyal to the United States during period of Japanese occupation (R. 21).
(e) *March 12, 1946*—Headquarters of United States Army,—

the United States recaptured the Philippines; however, the determination that he was loyal to the United States was never changed. (Respondent's Brief, pages 4, 5; R. 21).

As the seven determinations and constructions by respondent were neither uniform, general, nor long continued, and the Act is not ambiguous, the final determination cannot be given the force and effect of law. (*U. S.* v. *Falk*, 204 U. S. 142; *National Lead Co.* v. *U. S.*, 252 U. S. 140).

Treatment by Japanese

Respondent contends (Brief, pages 10-11) that the Army's determination was reasonable, and that although the Japanese occupation of the Philippine Islands involved detailed control over Philippine life, that it would be hard to impute to Congress an intent to allow full military pay and allowances to those who, like petitioner, took paying jobs with Japanese puppet agencies during the occupation. Congress, in amending the Missing Persons Act, specifically provided for such cases and prohibited such deduction during the occupation of pay, wages, allowances or other compensation received from the enemy, under Section 1009 of the Act. The intention of Congress and the purpose of the above pro-

---

that plaintiff was not in casualty status from *October 1, 1942* to *January 27, 1945*. (Ex. E. of Stipulation).

(f) *June 3, 1946*—Headquarters of United States Army,—that plaintiff was beleaguered, prisoner of war, and missing in action, but not in casualty status from *April 1, 1943* to *October 15, 1944*.

(g) *April 28, 1948*—Philippine Ryukus Command,—that plaintiff was not entitled to pay during period employed by puppet agency. (Ex. G of Stipulation; R. 4, 5).

Petitioner was retired on February 28, 1950, and given full credit for continuous active service in the United States Army from March 3, 1924.

vision is set out in No. 241 of the printed Hearings on H. R. 4405, House of Representatives, Committee on Naval Affairs, Tuesday, June 13, 1944, in the proposed Amendment to the Missing Persons Act, on page 2303[6].

The opinion of Col. Luis P. Torres, the Judge Advocate General of the Philippine Army, dated 4 June 1946, was rendered at the request of the Commanding General of the A. F. W. E. S. P. A., and was marked "secret, confidential and restricted", and filed by the Army with the Committee of Congress, 80th Congress, 1st Session, with the then pending Bill "Extending the Missing Persons Act to certain Filipino". The Court may, therefore, take judicial notice of this opinion (*U. S. v. Penn Foundry & Mfg. Co.*, 337 U. S. 198 at 216). Col. Torres, in his opinion, states that the Japanese did not actually release the prisoners as they were kept under the supervision and strict surveillance of the Japanese Kempei-tai or military police.[7]

---

[6] "7. That the accounts of a person in the hands of the enemy shall not be charged with any amount he may receive or that may be credited to his account by such enemy as pay, wages, allowances, or other compensation. * * * ."

"Some enemy governments are making payments to American prisoners of war or are crediting their accounts with pay at agreed rates. What Japan is doing, is not definitely known. The amounts paid or credited are relatively small and are only to officers. It is understood that enlisted men get some small amount of pay for work done, but get no regular pay from the holding power. In one camp, at least, the officer prisoners are pooling all amounts credited for the purchase of necessities and comfort for all prisoners, officers and enlisted men. A policy that these meager amounts are not to be charged to the officers or men who may receive them is considered desirable, and provision to that effect is incorporated in the item referred to under (7) above."

[7] "They were required to report periodically to the military police or some Japanese commanders in their respective localities; they were compelled, under threat, to be confined at Fort Santiago or any of its branches, to join the Japanese constabulary which was then in the process of formation, or otherwise constrained to seek employ-

ment in some governmental agency controlled by the Japanese Military Government for the purpose of keeping track of the activities of the prisoners. There were many cases of prisoners of war who were taken from Capas or other concentration camps and given specific assignments under some Japanese military commander. The result was that in whatever situation he found himself, whether by joining the Japanese controlled constabulary, by accepting employment in some governmental agency, or by being permitted to engage in some civilian or private activity in order to make a livelihood for himself and his family, the Filipino prisoner of war was always shadowed by the Japanese high command through the Kempei-tai or military police. No better proof can be offered in connection therewith than the contents of an order furnished each prisoner upon his so-called release under oath, whereby he was required to report *'when you are dead'* (see Appendix X). His freedom of action, nay, his freedom of thought, having thus become things of the past, it was next to impossible for him to move around freely in his neighborhood, because there were eyes watching his movements and tongues or pens ever ready to report him to the Kempei-tai, which invariably meant his arrest and confinement for an undetermined period of time, if not death caused by revoltingly unheard of, cruel and inhuman torture, of which his family was vaguely informed when they received his watch, wallet or other last personal belonging." ("The Case for the Philippine Army (U. S. A. F. F. E.) Veterans by Joaquin Miguel Elizalde", pp. 38, 39).

"All the activities of the inhabitants, even those of strictly private nature, were under control or regimentation. Foodstuffs, particularly those commodities that were very essential for the maintenance of the population, were so administered that priorities were given only to the Japanese forces and civilians, which accounted for the exorbitant prices which seriously affected living conditions in these Islands. The prices of prime commodities having increased from day to day, a man depending on his salary for a living hardly had enough to maintain his family for the first few days of the month. He had to devise other means, such as selling his furniture and other belongings piece by piece, if he had to survive during the remaining days of the month. * * *." ("The Case for the Philippine Army (U. S. A. F. F. E.) Veterans by Joaquin Miguel Elizalde", pp. 40, 41).

The extent of Japanese control over all phases of Philippine life did not pass unnoticed by the United States Congress, which, in a joint resolution approved June 29, 1944, declared:

> "Whereas the Japanese are now in possession and control of the *land, peoples, business, communication, and institutions* of the Commonwealth of the Philippines, and because of these circumstances the Filipino people are denied the free use and

Statutory and Contractual Right to Pay

Petitioner again urges as set forth in his Petition, page 14, that aside from his rights under the Missing Persons Act, he is entitled to his pay and allowances as provided by statute during the period he was an officer in the U. S. Army.

Petitioner is entitled to his pay and allowances, not because he performed certain work or stayed at a certain place; but because he held the office as an officer in the U. S. Army as created by statute. (*U. S.* v. *Andrews*, 240 U. S. 90; *U. S.* v. *Williamson*, 23 Wall. 411; *U. S.* v. *Wickersham*, 201 U. S. 390). Under the above authorities, the work and place of his confinement is immaterial, since he did not disobey orders and was loyal to, and a member of, the U. S. Army.

The pay of an officer cannot be withheld under Section 877, Title 10 U. S. C. A., when he is acting under an order he is bound to obey. (*Smith* v. *U. S.*, 24 Ct. Cls. 209). Petitioner was ordered to surrender and to be courteous and obedient to the Japanese Army and their orders. (R. 24). He was not indebted to the Army and the Army had no right to withhold his pay. (*Baker* v. *McCarl*, 24 F. 2d 897; *McCarl* v. *Lond*, 38 F. 2d 943; *White* v. *U. S.*, 72 Ct. Cls. 375; *Thomas Kenny* v. *U. S.*, 62 Ct. Cls. 328, 338; *McCarl* v. *Pence*, 18 F. 2d 809).

---

employment of the processes and political institutions jointly established by the Government of the United States and the Commonwealth of the Philippines for the transaction of private and public business and for the maintenance of liberty, law and order, and justice in the Philippine Islands.

"Whereas by their possession and invasion the Japanese have attempted to frustrate the free processes to independence in the Philippines by substituting therefor their own puppet government which was conceived in intrigue, *born in coercion*, and reared primarily for the purpose of Japanese selfishness and aggrandizement and not to achieve the independence and freedom of the Filipino people."

Even if petitioner had agreed to waive his right to pay and allowances while he was an officer of the U. S. Army in the Philippines during the Japanese occupation, it would be a complete nullity as his pay is fixed by statute, which he is entitled to recover. (*Glavey* v. *U. S.*, 182 U. S. 595; *U. S.* v. *Andrews*, 240 U. S. 90; *McMath* v. *U. S.*, 248 U. S. 151; *Ford* v. *U. S.*, 69 F. Supp. 332; *U. S.* v. *James*, 100 F. 2d 65).

The courts have always held that it requires the decision of a courtmartial to deprive an officer or enlisted man of his pay and emoluments (*Carrington* v. *U. S.*, 46 Ct. Cls. 279; *Harry Walsh* v. *U. S.*, 43 Ct. Cls. 225; *James L. White* v. *U. S.*, 72 Ct. Cls. 459).

The duty of the Army to pay plaintiff "is so plainly prescribed as to be free from doubt and equivalent to a positive command, and, therefore, is so far ministerial that its performance may be compelled by mandamus." (*Miguel* v. *McCarl*, 291 U. S. 442, 445).

Conclusion

For the reason stated herein, and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

LaVern R. Dilweg
815 15th Street, N. W.
Washington, D. C.
Counsel for Petitioner

T. Bruce Fuller
Robert H. McNeill
Of Counsel